SUMMARY OF MAJOR DECISIONS BY THE JUDICIAL OFFICER

Fiscal Year 1997

In *In re Andershock Fruitland, Inc.*, PACA Docket No. D-95-531, decided by the Judicial Officer on October 29, 1996 (2 pages), the Judicial Officer denied Respondents' Petition for Reconsideration for the reasons previously stated in the Decision and Order issued September 12, 1996, and for the reason that Respondents' Petition for Reconsideration neither states specifically the matters claimed to have been erroneously decided nor states briefly the alleged errors, as required by 7 C.F.R. § 1.146(a)(3).

In *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), HPA Docket No. 91-113, decided by the Judicial Officer on November 5, 1996 (102 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) dismissing the Complaint. The Judicial Officer held that Respondent Gary R. Edwards exhibited a horse while the horse was sore, but held that the other Respondents, Larry E. Edwards and Carl Edwards & Sons Stables, did not violate the Horse Protection Act (the owners had earlier consented). Respondent Gary R. Edwards was assessed a civil penalty of $2,000 and was disqualified for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, and from managing, judging, or otherwise participating in any horse show, exhibition, sale, or auction. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinions of veterinarians who relied solely upon palpation of the horse's pasterns. Past recollection recorded made while the events were still fresh in the minds of the witnesses is reliable, probative, and substantial. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raises the statutory presumption of a sore horse. The evidence of very extreme pain response upon palpation is also sufficient to make a *prima facie* case, which supports a finding of a violation of the Horse Protection Act, even in the absence of the presumption. There is no substantial evidence to support the ALJ's conclusion that the horse's abnormal sensitivity was caused by a "stumble" in the show. The *Martin* case does not help Respondents. Only Respondent Gary R. Edwards exhibited Rare Coin; Respondent Larry E. Edwards, a partner, and Carl Edwards & Sons Stables, the partnership, did not violate the Horse Protection Act. Pre-show passage by the DQP is meaningless to the post-show USDA inspection. Respondents' expert who had never examined the horse, but merely analyzed the videotape, given little weight. Respondent who exhibited the horse has no status to direct USDA veterinary staff on the proper method of examination of the horse. USDA and its witnesses are not biased against owners, exhibitors, or trainers of Tennessee Walking Horses. ALJ's Third Initial Decision and Order, like the two before it, are reversed and vacated because the ALJ failed to correct errors as directed by the Judicial Officer. ALJ's two new theories on palpation, that palpation is a rule subject to APA rule making and that palpation lacks a required "scientific" basis, are both rejected. ALJ erred: by giving no or scant credibility to USDA witnesses, by inferring that testimony of additional USDA experts would have been adverse to Complainant, and by assigning unwarranted great weight and credibility to Respondents' witnesses, even after Judicial Officer guidance on this issue. The ALJ's attack on palpation evidence, based upon the *Young* decision, is refuted by the Judicial Officer's *Bennett* decision. Respondent was an

absolute guarantor that the horse would not be sore when exhibited. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 5-year disqualification on Respondent, in addition to a $2,000 civil penalty.

In *In re Handlers Against Promoflor*, FCFGPIA Docket No. 96-0001, decided by the Judicial Officer on November 5, 1996 (4 pages), the Judicial Officer denied an application for interim relief. Under the governing Rules of Practice, (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), interim relief is only available to a person who files a petition pursuant to 7 C.F.R. § 900.52. (See 7 C.F.R. § 900.70(a).) Petitioner filed its petition pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief is not available to Petitioner. Further, even if interim relief had been available, Petitioner did not file a separate application for interim relief in accordance with 7 C.F.R. § 900.70(a). Finally, even if interim relief had been available to Petitioner and Petitioner had filed a separate application for interim relief in accordance with the applicable Rules of Practice, Petitioner's request for interim relief would be denied based upon established precedent.

In *In re Scamcorp, Inc.*, PACA Docket No. D-95-502, decided by the Judicial Officer on November 7, 1996 (18 pages) (Ruling on Respondent's Motion to Reconsider Ruling), the Judicial Officer ruled that Complainant was served with the Initial Decision and Order by delivery to a responsible individual at the last known principal place of business of Complainant's counsel in accordance with 7 C.F.R. § 1.147(c)(3)(i) on the day that Complainant's counsel verified receipt of the Initial Decision and Order by signing and dating a copy of the service letter, which accompanied the Initial Decision and Order to Respondent. The Hearing Clerk's Office Procedures Manual is an employee handbook that provides guidance to employees of the Office of the Hearing Clerk, not members of the public; and therefore is not required to be published in the *Federal Register*. Section 14 of the Hearing Clerk's Office Procedures Manual does not amend the Rules of Practice and specifically does not change the method, date, or proof of service provisions in the Rules of Practice. The Judicial Officer has jurisdiction to accept appeals that are inadvertently filed late, as long as the late-filed appeal is filed prior to the date on which the Initial Decision and Order becomes final and effective. The Judicial Officer's acceptance of the late-filed appeal need not precede the date that the Initial Decision and Order becomes final and effective.

In *In re Havana Potatoes of New York Corp.*, PACA Docket No. D-94-560, decided by the Judicial Officer on November 15, 1996 (62 pages), the Judicial Officer affirmed Judge Bernstein's (ALJ) Decision and Order revoking Respondent Havana's and Respondent Havpo's PACA licenses because Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make prompt payment for produce. Complainant proved Respondents' violations of the PACA and past-due debt by a preponderance of the evidence. Respondents may not convert a "no-pay" case to a "slow-pay" case by paying all outstanding debts alleged in the Complaint, if Respondents are not in full compliance with the payment provisions of the PACA at the time of the hearing. Produce supplier invoices obtained from Respondents' files and tables of past-due debts prepared by USDA investigators based upon examinations of Respondents' files are highly reliable, probative, and substantial evidence of

Respondents' violations of the PACA and Respondents' past-due debt. Respondents' purchases of produce from out-of-state suppliers were in interstate and foreign commerce and Respondent Havana's purchases of produce from in-state produce suppliers involving produce that had been moved in interstate or foreign commerce were in interstate or foreign commerce. The sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, does not change the policy set forth in *In re The Caito Produce Co*. Excuses for failure to pay and collateral effects of revocation are not relevant circumstances under the Department's sanction policy for sanctions imposed for flagrant or repeated failures to make full payment promptly under the PACA.

In *In re Arizona Livestock Auction, Inc.*, P. & S. Docket No. D-96-26, decided by the Judicial Officer on November 21, 1996 (22 pages), the Judicial Officer vacated the Default Decision by Administrative Law Judge Dorothea A. Baker (ALJ) assessing a civil penalty against Respondent and directing Respondent to cease and desist from engaging in any act or practice, in connection with the providing of stockyard services, with regard to delivery, unloading, care, and handling of livestock received at the stockyard, which results in unnecessary damage, injury, or suffering to the livestock. A failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). However, on rare occasions Default Decisions have been set aside for good cause shown or where Complainant did not object. Respondent's jurisdictional challenge to the proceeding constitutes good cause for vacating the Default Decision. The Packers and Stockyards Act is one of the most comprehensive regulatory measures ever enacted and is remedial legislation that should be liberally construed to effectuate its purposes. Although the purposes of the Packers and Stockyards Act have been variously described, there is nothing in the Act, the legislative history relating to the Act, or the pertinent case law indicating that the Packers and Stockyards Act is designed to prevent injury to or suffering of livestock apart from the effect that the injury or suffering of the livestock may have on competition, trade, producers, purchasers, consumers, or other persons that the Packers and Stockyards Act is designed to protect. The Secretary of Agriculture's jurisdiction under the Packers and Stockyards Act is not dependent on proof that an animal is consigned for sale to Respondent or sold by Respondent, or on proof that there was actual economic harm to an individual. Instead, the Secretary of Agriculture's jurisdiction is dependent on whether Respondent engaged in an *unfair* or *unreasonable* practice. The meaning of the words *unfair* and *unreasonable* must be determined by the facts of each case within the purposes of the Packers and Stockyards Act. The record in the instant proceeding establishes that Respondent failed to provide shelter, food, and water to a disabled cow for approximately 3 hours. However, the record does not establish that Respondent's conduct affected any person or anything other than the disabled cow. Therefore, the record does not establish that Respondent engaged in an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act or that Respondent's conduct resulted in or could result in the type of injury that the Packers and Stockyards Act is designed to prevent, and the Complaint is dismissed without prejudice.

In *In re Far West Meats*, FMIA Docket No. 91-0002 and PPIA Docket No. 91-0001, decided by the Judicial Officer on November 27, 1996 (13 pages), the Judicial Officer clarified the September 27, 1996, Ruling on Certified Questions in *In re Far West Meats*. The word *entertain,* as used in section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), means

consider and does not authorize or require an ALJ to make any particular ruling. The word *rule*, as used in section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), means *decide* and does not authorize or require an ALJ to make a particular ruling. Thus, while an ALJ is required by section 1.143(b)(1) of the Rules of Practice to *entertain* motions and required by section 1.143(a) of the Rules of Practice to *rule* on motions, neither section 1.143(b)(1) nor section 1.143(a) authorizes or requires an ALJ to make a particular ruling. An ALJ does not have jurisdiction to modify a previously-entered Consent Decision, when a party to the Consent Decision opposes the modification. Such a modification would result in the creation of a document that would not reflect the agreement of the parties. The resulting document would not constitute a Consent Decision under section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), but rather, would be a nullity. Further, section 1.138 of the Rules of Practice provides that a Consent Decision becomes final upon issuance. Once the Consent Decision is issued, the administrative proceeding is closed and the ALJ has no jurisdiction over the proceeding, except to vacate the Consent Decision in extraordinary circumstances. Therefore, while an ALJ must entertain a motion to modify a Consent Decision and must rule on the motion to modify a Consent Decision, the ALJ has no jurisdiction to grant the motion and enter a modified Consent Decision, if the motion is opposed by one or more of the parties to the previously-entered Consent Decision. The extraordinary circumstances exception is limited to an examination of circumstances that relate to the assent of the parties to the agreement and the ALJ may only vacate a Consent Decision if the ALJ finds that there was no genuine assent to the agreement that was entered as a Consent Decision. A change in circumstances subsequent to the entry of the Consent Decision does not provide a basis upon which an ALJ may vacate a Consent Decision.

In *In re Cal-Almond*, 96 AMA Docket No. F&V 97-0001, decided by the Judicial Officer on December 24, 1996 (3 pages), the Judicial Officer denied an application for interim relief. Petitioner did not file a separate application for interim relief in accordance with 7 C.F.R. § 900.70(a). Moreover, even if Petitioner had filed a separate application for interim relief in accordance with the Rules of Practice, Petitioner's application for interim relief would be denied based upon established precedent.

In *In re Arizona Livestock Auction, Inc.*, P.& S. Docket No. D-96-26, decided by the Judicial Officer on January 13, 1997 (5 pages), the Judicial Officer denied Complainant's Petition for Reconsideration. The facts alleged in the Complaint, which Respondent is deemed to have admitted by its failure to file an answer: (1) do not establish that Respondent engaged in an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act; (2) do not establish that Respondent's conduct resulted in or could result in the type of injury that the Packers and Stockyards Act is designed to prevent; (3) do not establish that Respondent had predatory intent within the meaning of the Packers and Stockyards Act; (4) do not establish that Respondent's conduct constitutes an incipient violation of the Packers and Stockyards Act; (5) do not establish that Respondent violated 9 C.F.R. § 201.82 and 7 U.S.C. §§ 208, 213(a), as alleged in the Complaint; and (6) do not establish that the Secretary has jurisdiction over this matter. Therefore, there is no basis for granting Complainant's Petition for Reconsideration of the Decision and Order filed on November 21, 1996, vacating the ALJ's Default Decision.

Complainant may file a new Complaint which alleges facts that constitute a basis for a proceeding under the Packers and Stockyards Act.

In *In re Volpe Vito, Inc.*, AWA Docket No. 94-08, decided by the Judicial Officer on January 13, 1997 (126 pages), the Judicial Officer affirmed Judge Kane's (ALJ) Decision and Order revoking Respondent's license and directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the regulations and standards issued under the Act. However, the Judicial Officer assessed a civil penalty of $26,000. Complainant, as proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. The Judicial Officer found inspection reports introduced by Complainant and Complainant's witness' testimony to be substantial evidence of 51 violations alleged in the Complaint; consequently, the Judicial Officer reversed the ALJ's dismissal of 45 of those violations. The inspection reports were not prepared in anticipation of litigation, and the facts surrounding the preparation of the inspection reports are not similar to the facts surrounding preparation of the documents at issue in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995). Off-the-record discussions between counsel and counsel's witness are not prohibited by the Administrative Procedure Act or the Rules of Practice, and the record does not reveal any instruction by the ALJ that counsel and counsel's witness were not to discuss testimony off-the-record. Respondent's violations were willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)). Respondent's argument that the sanction imposed is disproportionate to sanctions imposed in two previous disciplinary proceedings under the Animal Welfare Act is without merit because Respondent is not entitled to a sanction no more severe than that applied to others, and the facts in the two previous cases cited by Respondent are not similar to the facts in the proceeding against Respondent. Respondent's failing health is not a mitigating factor. The ALJ erred by excluding from evidence a warning letter concerning previous alleged violations by Respondent. While the warning letter is not relevant to the violations alleged in the Complaint, it is relevant to the sanction. The sanction imposed is appropriate under the circumstances in the case and is in accordance with the Animal Welfare Act and the Department's sanction policy.

In *In re Garelick Farms, Inc.*, 94 AMA Docket No. M 1-1, decided by the Judicial Officer on January 14, 1997 (55 pages), the Judicial Officer reversed Judge Kane's (ALJ) Initial Decision and Order granting a Petition, filed by a milk handler under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, seeking cancellation of an underpayment notice issued by the Market Administrator of Federal Milk Marketing Order No. 1. Petitioner asserts that the Market Administrator does not have authority under Federal Milk Marketing Order No. 1 to require Petitioner to substitute the Market Administrator's average butterfat test results for Petitioner's average butterfat test results and require Petitioner to pay producers on the basis of the Market Administrator's test results. The burden of proof in a proceeding under 7 U.S.C. § 608c(15)(A) rests with Petitioner, and Petitioner has not met its burden of proof. The Market Administrator has authority under the Agricultural Marketing Agreement Act and Federal Milk Marketing Order No. 1: to test milk for butterfat content; to require handlers to use the Market Administrator's average butterfat test result for each producer to calculate the amount to be paid for milk received from each producer; and to issue an underpayment notice to a handler, requiring the handler to pay producers on the basis of the Market Administrator's average

butterfat test results. Both the Market Administrator's method of determining butterfat content in milk samples and the Market Administrator's use of the Bartlett formula tolerances and t-test, (to determine the significance of the difference between his test result and Petitioner's test result), are lawful and reasonable. The Bartlett formula is not a *rule* under the Administrative Procedure Act; therefore, the Market Administrator's use of the Bartlett formula tolerances need not be preceded by a rulemaking proceeding conducted in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

In *In re Gerald Funches*, HPA Docket No. 96-0002, decided by the Judicial Officer on January 15, 1997 (16 pages), the Judicial Officer affirmed the Default Decision by Judge Bernstein (ALJ). Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). The Rules of Practice provide that Respondent shall file with the Hearing Clerk an Answer signed by the Respondent or the attorney of record, (7 C.F.R. § 1.136(a)); but Respondent's unsuccessful attempts to reach the Hearing Clerk do not constitute filing with the Hearing Clerk. Accordingly, the Default Decision was properly issued.

In *In re Dora Hampton*, AWA Docket No. 96-0050, decided by the Judicial Officer on January 15, 1997 (25 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge Victor W. Palmer (ALJ) assessing a civil penalty of $10,000 against Respondent, suspending Respondent's Animal Welfare Act (Act) license for 60 days, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. Neither Respondent's inability to comply with the Act and the Regulations and Standards issued under the Act due to her age nor Respondent's intention to dispose of all animals within the jurisdiction of the Secretary under the Act operates as a defense.

In *In re Five Star Food Distributors, Inc.*, PACA Docket No. D-96-0521, decided by the Judicial Officer on January 23, 1997 (22 pages), the Judicial Officer affirmed Judge Baker's (ALJ) Decision Without Hearing by Reason of Admissions publishing the finding that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. The ALJ's taking of official notice of documents Respondent filed in a bankruptcy proceeding is in accord with the Administrative Procedure Act, (5 U.S.C. § 556(e)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(6)); the Rules of Practice, (7 C.F.R. § 1.145(i)), require the Judicial Officer to rule on appeals, upon the basis of and after due consideration of the record and any matter of which official notice is taken; and documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings. Respondent has had ample time to obtain documents for its defense

and the recent illness of one of Respondent's employees, who is knowledgeable of the documents, is not a basis for setting aside the ALJ's decision and remanding the matter to the ALJ for further proceedings. Publication of the facts and circumstances of a violation of 7 U.S.C. § 499b is not dependent on finding that the violation was willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or if a person carelessly disregards statutory requirements. Failures to make full payment promptly in numerous transactions over 11 months constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).

In *In re Saulsbury Enterprises*, AMAA Docket No. 94-2, decided by the Judicial Officer on January 29, 1997 (29 pages), the Judicial Officer denied Respondents' Petition for Reconsideration. Reliable hearsay is admissible in proceedings conducted under the Rules of Practice and hearsay is not made inadmissible by 7 C.F.R. § 1.141(h)(1)(i). Further, testimony that is relevant, material, and not unduly repetitious regarding the circumstances surrounding the taking of a written statement is admissible. The Judicial Officer gives great weight to the findings by ALJs. However, the Judicial Officer may reverse as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved; (2) the record is sufficiently strong to compel a reversal as to the facts; or (3) an ALJ's findings of fact are hopelessly incredible. Moreover, the Judicial Officer is not bound by the ALJ's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. The burden of proof is on the Complainant and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. Complainant met its burden of proof and Respondents failed to introduce sufficient evidence to overcome Complainant's evidence that the product that Respondents' shipped to Canada was raisins. Respondents were required by 7 C.F.R. § 989.58(d) to have their raisins inspected each time they acquired the raisins and Respondents were required by 7 C.F.R. § 989.59(d) to have their raisins inspected each time they shipped the raisins. Respondent Robert J. Saulsbury's age and gender, the number of acres on which Respondents grow raisins, and the amount of money Respondents spend a year lobbying are not relevant to any aspect of this proceeding. The imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. Neither disdain for Respondents nor the size of either Respondent forms any part of the basis for the civil penalty assessed. The $219,000 civil penalty assessed against Respondents for 219 violations of the Raisin Order is authorized by 7 U.S.C. § 608c(14)(B), and is in accordance with the Department's sanction policy and the purpose of the civil penalty provision in 7 U.S.C. § 608c(14)(B). Respondents were given due process. Respondents have no right to a jury trial in an Article III court. Respondents' assertion that the Decision and Order violates Article II of the United States Constitution is without merit.

In *In re Havana Potatoes of New York Corp.*, PACA Docket No. D-94-560, decided by the Judicial Officer on February 4, 1997 (16 pages), the Judicial Officer denied Respondents' Petition to Reconsider. Complainant, as proponent of an order, bears the burden of proof. Complainant not only met its burden of proof, but also met the burden of persuasion by a preponderance of the evidence. Complainant introduced substantial evidence of Respondents'

willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). Hearsay documents prepared in anticipation of litigation are admissible, and under the circumstances, have probative value. Testimony regarding admissions of Respondents' president is entitled to considerable weight. The whole record was considered prior to the issuance of the Decision and Order and imposition of the sanctions.

In *In re Ruma Fruit and Produce Co., Inc.*, PACA Docket No. D-94-565, decided by the Judicial Officer on February 6, 1997 (20 pages), the Judicial Officer affirmed Judge Baker's (ALJ) decision assessing Respondent a civil penalty of $12,400 or in lieu thereof imposing a 45-day suspension of Respondent's PACA license. For the reasons set forth in *In re Ruma Fruit and Produce Co.*, 55 Agric. Dec. 642 (1996), the record supports the conclusion that Respondent willfully violated 7 U.S.C. § 499h(b) and the suspension of Respondent's PACA license for 45 days. Section 8(e) of the PACA (7 U.S.C. § 499h(e)) authorizes the assessment of a civil penalty in lieu of a license suspension or license revocation. When determining the amount of the civil penalty, the size of the business, the number of employees, and the seriousness, nature, and amount of the violation must be given due consideration. The violator's net profits, ability of the violator to pay the civil penalty, and ability of the violator to continue to conduct business after the civil penalty is assessed are not required to be considered when determining the amount of the civil penalty. Respondent's request that the parties be required to mediate an agreement to a payment plan is denied.

In *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), HPA Docket No. 93-15, decided by the Judicial Officer on March 13, 1997 (86 pages), the Judicial Officer reversed the decision by Judge Kane (ALJ) dismissing the Complaint. The Judicial Officer held that Respondent Gary R. Edwards entered a horse while the horse was sore, but held that the other Respondents, Larry E. Edwards, Etta Edwards, and Carl Edwards & Sons Stables, did not violate the Horse Protection Act. Respondent Gary R. Edwards was assessed a civil penalty of $2,000 and was disqualified for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, and from managing, judging, or otherwise participating in any horse show, exhibition, sale, or auction; such period of disqualification to run consecutively with the disqualification period imposed in *In re Gary R. Edwards*. Respondent Gary R. Edwards admitted transporting the horse to the show, which admission could have supported the Complaint's allegation of transporting a horse while sore with intent to enter the horse while sore in an exhibition or show, but sufficiency of the imposed sanction, and the unique facts of this case, cause Judicial Officer to demur, based on *Livolsi*. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinions of veterinarians who relied solely upon digital palpation of the horse's pasterns. Past recollection recorded made while the events were still fresh in the minds of the witnesses is reliable, probative, and substantial. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raises the statutory presumption of a sore horse. The evidence of bilateral pain response upon moderate palpation, *e.g.*, tucking of abdominal muscles, withdrawing of feet, rearing, etc., with the expert Veterinary Medical Officers' opinions that the horse would be likely to experience pain while moving, are sufficient

to make out a *prima facie* case, which supports a violation of the Horse Protection Act, even in the absence of the presumption. Agency VMOs found bilateral excessive scarring on the horse, and hair loss, which surpasses the minimum requirements of bilateral evidence of abuse indicative of soring, which invokes the irrebuttable presumption: horses which do not meet scar rule criteria are considered sore. Only Gary R. Edwards entered Time Around Town; Respondents Larry E. Edwards, Etta Edwards, and Carl Edwards & Sons Stables, the partnership, did not violate the Horse Protection Act, merely because they were partners of the violator. Pre-show passage by the DQP is meaningless to the USDA pre-show inspection. Videotapes of horse inspections are of reduced value when made by private veterinarians after the official inspection, but non-subjective evidence on a videotape for anyone to see may be considered to corroborate or contradict expert witnesses testifying about the videotape. Expert witness testimony based upon examinations conducted some time after the official inspection with no proper safeguards are of little value. Private veterinarians who require multiple indicia of soreness, such as gait dysfunction, heat, or increased respiration--beyond the requirements of the HPA--deserve little credibility. ALJ's theories on palpation, that palpation is a rule subject to APA rulemaking and that palpation lacks a required "scientific" basis, are both rejected. ALJ erred: by giving no or scant credibility to USDA witnesses and by assigning unwarranted great weight to Respondents' witnesses. The ALJ's attack on palpation evidence, based upon the *Young* decision, is refuted by the Judicial Officer's *Bennett* decision. Respondent Gary R. Edwards was an absolute guarantor that the horse would not be sore when entered. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 5-year disqualification, in addition to the $2,000 civil penalty.

In *In re Mary Meyers*, AWA Docket No. 96-0062, decided by the Judicial Officer on March 13, 1997 (34 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of $26,000 against Respondent, disqualifying Respondent from obtaining an Animal Welfare Act (Act) license for 10 years, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. Respondent's correction of violations identified by APHIS inspectors, Respondent's disposal of all animals within the jurisdiction of the Secretary under the Act, and Respondent's intention to give up her Animal Welfare Act license do not operate as defenses.

In *In re Stimson Lumber Company*, FSSAA Docket No. 97-0001, decided by the Judicial Officer on March 18, 1997 (29 pages), the Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer (Chief ALJ) approving the Applicant's proposed sourcing area. The sourcing area is geographically and economically separate from any geographic area from which the Applicant harvests for export timber originating from private lands. The evidence adequately supports the Chief ALJ's Findings and Conclusions. Alleged violations of the Federal

Resources Conservation and Shortage Relief Act of 1990 (FRCSRA) by the Applicant are not relevant to this proceeding. Generally, the ALJs and the Judicial Officer are bound by the Rules of Practice, but they may modify the Rules of Practice when modification is necessary to comply with statutory requirements, such as the deadline in section 490(c)(3) of the FRCSRA. Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1997, of the Omnibus Consolidated Appropriations Act, 1997, does not prohibit consideration of applications for new sourcing areas. The ALJs have no authority to transfer cases to district courts of the United States or to consolidate a case with a case in a district court of the United States. The review by the Forest Service was adequate, but even if it were not, that is irrelevant as long as a preponderance of the evidence supports the Applicant. There was no failure to comply with the 4-month statutory deadline, but even if there were, it would have no effect on granting the application. The Judicial Officer must review the record prior to issuing a decision. Sourcing area applications can be filed after December 20, 1990.

In *In re Five Star Food Distributors, Inc.*, PACA Docket No. D-96-0521, decided by the Judicial Officer on March 19, 1997 (7 pages), the Judicial Officer denied Respondent's Petition for Reconsideration. Respondent has had approximately 11 months to obtain documents for its defense and there is no basis for providing Respondent with an additional 20 days within which to submit records which Respondent believes will show that Respondent did not violate the PACA. Respondent admits in documents that it filed in a bankruptcy proceeding, *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995), that it owes at least $238,374.08 to the 14 produce sellers which Complainant alleges Respondent has failed to pay promptly and in full, in accordance with the PACA. Respondent has provided no basis for its contention, which it makes for the first time in its Petition for Reconsideration, that its bankruptcy filings are false.

In *In re John Walker*, AWA Docket No. 96-0085, decided by the Judicial Officer on March 21, 1997 (24 pages), the Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of $5,000 against Respondent, suspending Respondent's Animal Welfare Act (Act) license for 30 days, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. Respondent's correction of violations identified by APHIS inspectors does not operate as a defense. The sanction imposed is appropriate under the circumstances in the case and is in accordance with the Act.

In *In re Kanowitz Fruit and Produce, Co., Inc.*, PACA Docket No. D-95-504, decided by the Judicial Officer on March 21, 1997 (33 pages), the Judicial Officer affirmed Judge Bernstein's (ALJ) Decision and Order revoking Respondent Kanowitz's license because Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7

U.S.C. § 499b(4)) by failing to make prompt payment for produce. Complainant proved Respondent's violations of the PACA and past-due debt by a preponderance of the evidence. Respondents may not convert a "no pay" case into a "slow pay" case by paying all outstanding debts alleged in the Amended Complaint, if Respondent is not in full compliance with the PACA payment provisions at the time of the hearing. Partial payment of outstanding debt does not satisfy full payment requirement, even if creditor agrees to discharge debt. Only 100% compliance at time of hearing triggers lowered sanction. Evidence of Respondent's outstanding debts is routinely admitted at time of failure-to-pay-promptly hearing to determine current compliance; but sanction is for the violations alleged in the Complaint and not for the roll over debt. Paying creditors named in the Complaint, while not paying other creditors within statutory requirements, is called "robbing Peter to pay Paul," and does not support a lowered sanction. PACA has no requirement that there be uniform sanctions among violators. ALJ's revocation sanction based upon this record was not arbitrary and capricious (5 U.S.C. § 706(A)(2)). The sanction policy set forth in *In re S.S. Linn County, Inc.*, does not change the policy set forth in *In re The Caito Produce Co.* Excuses for failure to pay and collateral effects of revocation are not relevant circumstances under the Department's sanction policy for sanctions imposed for flagrant or repeated failures to make full payment promptly under the PACA.

In *In re David Hubbard* (Decision as to David Hubbard), HPA Docket No. 96-0001, decided by the Judicial Officer on March 25, 1997 (16 pages), the Judicial Officer affirmed the Default Decision by Judge Hunt (ALJ), except that the Judicial Officer increased the assessed civil penalty from $2,000 to $4,000 and increased the period of disqualification from 1 year to 6 years. Respondent's failure to file a timely Answer is deemed an admission of two violations of 15 U.S.C. § 1824(2)(B) alleged in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). However, there is no evidence in the record as to the device used by Respondent to sore one of the horses, and Respondent neither has admitted nor is deemed to have admitted allegations in Complainant's motion for a default decision. The record does not reveal any basis for an exception from the usual practice of imposing the maximum civil penalty of $2,000 for each violation, a 1-year disqualification period for the first violation of the HPA, and a 5-year disqualification for the second violation of the HPA.

In *In re City of Orange, California*, AWA Docket No. 96-0044, decided by the Judicial Officer on March 25, 1997 (5 pages), the Judicial Officer granted: (1) Respondent's Request to Withdraw Motion for Stay of Monetary Sanctions; (2) Respondent's Request to Withdraw Petition for Reconsideration; and (3) Complainant's and Respondent's joint request to modify paragraph 1 of the Order issued in *In re City of Orange*, 55 Agric. Dec. ___ (Sept. 12, 1996). Withdrawal of a petition for reconsideration is not a matter of right, but there is no basis under the circumstances in this proceeding to deny Respondent's request to withdraw petition for reconsideration.

In *In re Volpe Vito, Inc.*, AWA Docket No. 94-0008, decided by the Judicial Officer on April 16, 1997 (13 pages), the Judicial Officer denied Respondent's Petition for Reconsideration. The sanction imposed is appropriate under the circumstances in the case and is in accordance with the Animal Welfare Act and the Department's sanction policy. Respondent's argument that

the sanction imposed is disproportionate to sanctions imposed in previous disciplinary proceedings under the Animal Welfare Act is without merit because Respondent is not entitled to a sanction no more severe than that applied to others. The Decision and Order in the proceeding is based upon a consideration of the whole record in accordance with 5 U.S.C. § 556(d).

In *In re Midway Farms, Inc.,* 94 AMA Docket No. F&V 989-1, decided by the Judicial Officer on April 18, 1997 (19 pages), the Judicial Officer vacated Chief Administrative Law Judge Victor W. Palmer's (Chief ALJ) dismissal without prejudice of the 15(A) Petition because the Judicial Officer determined that the Petition must be dismissed with prejudice to prevent the filing of the same Petition. Petitioner's allegation in its Petition that it is not a processor, packer, or handler means that it lacks standing to bring a 15(A) action. The Chief ALJ's views on the irrelevant issues of Petitioner's proprietary information; untrustworthiness of AMS inspectors; and tolling of civil penalties under 7 U.S.C. § 14(B), are vacated. The Judicial Officer dismissed the Petition with prejudice, preventing Petitioner from refiling this Petition if alleging that Petitioner is not a handler, but not prohibiting Petitioner from refiling alleging that it is a handler, if the proper documentation is simultaneously filed showing that it is a handler.

In *In re Gail Davis*, AWA Docket No. 97-0001, decided by the Judicial Officer on April 18, 1997 (26 pages), the Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Dorothea A. Baker's Default Decision and Order became final. Even if Respondent's appeal had been timely filed, it would have been denied based upon Respondent's failure to file a timely Answer which, under the Rules of Practice (7 C.F.R. § 1.136(c)), constitutes an admission of the allegations in the Complaint.

In *In re Ann M. Veneman*, NDPRB Docket No. 95-0001, decided by the Judicial Officer on May 6, 1997 (92 pages), the Judicial Officer affirmed Chief Judge Palmer's (Chief ALJ) Initial Decision and Order denying a Petition filed under the Dairy Production Stabilization Act of 1983, as amended (7 U.S.C. §§ 4501-4538) (Dairy Act), by the Secretary of the California Department of Food and Agriculture (CDFA); the California Milk Producers Advisory Board (CMAB), a qualified state dairy product promotion, research, or nutrition education program; and Frank Hilarides, a dairy farmer. The burden of proof in a proceeding under 7 U.S.C. § 4509(a) rests with Petitioners, and Petitioners have not met their burden of proof. The Judicial Officer found that any person subject to an order may institute a petition under 7 U.S.C. § 4509(a), but that the Secretary of CDFA and CMAB are not subject to the Dairy Order, and that, therefore, both the Secretary of CDFA and CMAB lack standing. Neither the National Dairy Promotion and Research Board's (NDB) agreement with United Dairy Industry Association (UDIA) to form Dairy Management, Inc. (DMI), a private not-for-profit corporation in which the staffs of UDIA and NDB are merged, nor the operation of DMI, violate the Dairy Act, the Dairy Order, the Freedom of Information Act, 31 U.S.C. § 9102, or the Federal Advisory Committee Act. Further, the formation of DMI need not be preceded by a notice-and-comment rulemaking proceeding under the Administrative Procedure Act (5 U.S.C. § 553), and members of NDB who participated in the decision to form DMI did not violate either the conflict-of-interest provisions in the Dairy Order or 18 U.S.C. § 208(a). The formation of DMI is not an invalid delegation of

NDB's authority, and there is no evidence that NDB failed to review its charter and activities to ensure that it has not inappropriately delegated its responsibilities and duties to another organization in violation of section 1999S(b) of the Food, Agriculture, Conservation and Trade Act of 1990. The Chief ALJ properly sustained objections to Petitioners' questions probing the mental processes of a government witness.

In *In re Patrick D. Hoctor*, AWA Docket No. 93-0010, decided by the Judicial Officer on May 30, 1997 (25 pages), the Judicial Officer issued an Order modifying the Judicial Officer's May 5, 1995, Decision and Order in light of the decision in *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996), vacating the Judicial Officer's May 5, 1995, decision, *In re Patrick D. Hoctor*, 54 Agric. Dec. 114 (1995). Respondent filed an appeal from the Judicial Officer's May 5, 1995, decision, which appeal was limited to the Judicial Officer's decision that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.125(a) by failing to have an 8-foot high perimeter fence. The United States Court of Appeals for the Seventh Circuit held that the USDA rule governing the minimum height of enclosures for dangerous animals is a substantive rule subject to the notice and comment procedure set forth in the Administrative Procedure Act (5 U.S.C. § 553) and that the rule requiring Respondent's perimeter fence to be 8 feet high is invalid because it was not promulgated in accordance with the required procedure. None of the other violations found in the Judicial Officer's May 5, 1995, decision was the subject of Respondent's appeal. Therefore, a new Order is issued which adopts the May 5, 1995, Order modified in light of *Hoctor v. United States Dep't of Agric., supra*. The Order requires Respondent to cease and desist from failing to keep primary enclosures sanitary and in suitable condition, failing to keep watering receptacles clean, failing to provide adequate veterinarian care, and failing to establish and maintain an appropriate plan for environmental enhancement adequate to primates; assesses a $1,000 civil penalty against Respondent; and suspends Respondent's license for 15 days and thereafter until he is in full compliance with the Act, regulations, and standards. Respondent violated 9 C.F.R. § 2.50 by not individually identifying cats, notwithstanding the fact that APHIS was considering his request for an interpretation of the regulation that would not require tattooing. However, only a cease and desist order will be issued as to this violation.

In *In re Kanowitz Fruit and Produce, Co., Inc.*, PACA Docket No. D-95-504, decided by the Judicial Officer on June 5, 1997 (21 pages), the Judicial Officer denied Respondent's Petition to Reconsider. Respondent may not convert a "no-pay" case into a "slow-pay" case by paying all outstanding debts alleged in the Complaint and Amended Complaint, if Respondent is not in full compliance with the PACA payment provisions at the time of the hearing. Evidence of the "commercial reasonableness" of agreements between Respondent and its produce creditors, Respondent's financing arrangements, and the payment practices of persons in the perishable agricultural industry are not relevant to the existence of Respondent's roll-over debt. Respondent's good faith efforts to pay produce creditors and the collateral effects of license revocation are relevant neither to a determination whether Respondent violated the PACA nor to the sanction to be imposed for flagrantly or repeatedly violating the payment provisions of the PACA. The PACA has no requirement that there be uniform sanctions among violators. Sanction witness testimony is permitted. License revocation is an appropriate sanction under the

circumstances. One of the purposes of revocation is to deter others in the perishable agricultural commodities industry from violating the PACA.

In *In re David M. Zimmerman*, AWA Docket No. 94-0015, decided by the Judicial Officer on June 6, 1997 (62 pages), the Judicial Officer affirmed Judge Bernstein's (ALJ) Initial Decision and Order suspending for 60 days Respondent's license, directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act, and assessing a civil penalty of $51,250. Complainant, as the proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. Complainant much more than met this burden and proved that Respondent failed, *inter alia*, to: make and retain complete records; mark and identify Respondent's dogs; comply with the Regulations and the Standards; provide an adequate program of veterinary care and make certain that the animals in need of veterinary care received such care; handle dogs without unnecessary trauma; maintain structurally sound dog housing in good repair; maintain physical separation of dog housing from other businesses; store food and bedding properly; properly drain and dispose of waste; provide proper ventilation in dog housing; provide proper lighting in dog housing; provide surfaces in dog housing impervious to moisture; provide proper protection from the elements to dogs housed outside; provide structurally sound primary dog housing with sufficient space and sufficient flooring, but no sharp edges; maintain clean self-feeders; maintain clean and sanitized water bowls; remove excreta often enough; and maintain enough employees to comply with the Act and the Regulations and Standards. Respondent's claims, *inter alia*, that the kennels were cleaned daily and that Respondent had always provided proper veterinary care, were not credible in light of Complainant's overwhelming evidence. Respondent did not credibly counter Complainant's evidence of repeated, serious violations, but rather, complained of overzealous enforcement during the period of the 10 inspections. An ALJ is not required to apportion his decision between the parties; rather, the ALJ decides the case based upon the evidence. The inspector is not required to walk Respondent through the inspection, but routinely gives a copy of the written report to Respondent and explains it to Respondent. It is well settled that a violation corrected prior to a subsequent inspection does not exculpate Respondent for the original violation. Respondent's failure to have an attorney and an interpreter at the hearing do not mitigate the violations.

In *In re Fred Hodgins*, AWA Docket No. 95-0022, decided by the Judicial Officer on July 11, 1997 (168 pages), the Judicial Officer affirmed Judge Hunt's (ALJ) Initial Decision and Order assessing a civil penalty and directing Respondents to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act. However, the Judicial Officer also suspended Respondents' license for 14 days and reduced the civil penalty assessed from $16,000 to $13,500. Respondents bear the burden of proving that they are the target of selective prosecution but failed to sustain this burden because they did not show membership in a protected group, that others in a similar situation not members of the protected group would not be prosecuted, or that prosecution was initiated with discriminatory intent. The warrantless searches of Respondents' facility were reasonable and fell within the "closely regulated industry" exception to the warrant requirement. The Complaint fully complies with both the Administrative Procedure Act (5 U.S.C. § 554(b)) and the Rules of Practice (7 C.F.R. §

1.135), and the record reveals that Respondents were reasonably apprised of the issues in controversy and not misled by the Complaint. Complainant, as proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. The Judicial Officer found inspection reports introduced by Complainant and Complainant's witnesses' testimony to be substantial evidence of 58 violations alleged in the Complaint. The Federal Rules of Evidence are not applicable to administrative proceedings conducted under the Administrative Procedure Act in accordance with the Rules of Practice, and reliable hearsay is routinely admissible in federal administrative hearings and can be substantial evidence as long as it is reliable, probative, and meets the test of fundamental fairness. The inspection reports were not prepared in anticipation of litigation, and the facts surrounding the preparation of the inspection reports are not similar to the facts surrounding preparation of the documents at issue in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995). The Regulations and Standards issued under the Act are not unconstitutionally vague. The ALJ's denial of Respondents' subpoena to assist in the preparation of their defense was proper because discovery is not available under the Rules of Practice. Jencks Act statements may only be obtained after a witness has testified on direct examination, and the ALJ's denial of Respondents' prehearing motion for Jencks Act statements is proper. Further, *Brady v. Maryland*, 373 U.S. 83 (1963), is inapposite to administrative proceedings under the Act. Sound recordings are generally admissible in these proceedings. However, there was no foundation sufficient to show that Respondents' recordings are trustworthy. Respondents did not preserve their right to appeal the ALJ's ruling limiting their cross-examination of a witness in accordance with 7 C.F.R. § 1.141(h)(2). Respondents' correction of the violations does not operate to eliminate the fact that violations occurred, does not provide a basis for the dismissal of alleged violations, and does not prevent the assessment of a civil penalty for violations. While some of Respondents' violations are trivial, *In re Marlin U. Zartman*, 44 Agric. Dec. 174 (1985), is inapposite because Respondents have committed 58 violations of the Act, some of which are serious. The term *adequate veterinary care* means *sufficient veterinary care* not *barely sufficient veterinary care*. The mere presence of outdated drugs on Respondents' premises does not violate 9 C.F.R.§ 2.40. Theft of an animal is not an element of a violation of 9 C.F.R. § 2.50. Respondents' violations were willful (5 U.S.C. § 558(c)), and Respondents received written notice prior to the date that this proceeding was instituted as provided in 7 C.F.R. § 1.133(b)(2). Evidence regarding a defamation action instituted by Respondent Fred Hodgins against animal rights activists and the influence of animal rights activists on the Department is irrelevant to this proceeding. The Judicial Officer accords great weight to the ALJ's credibility determinations, but the Judicial Officer is not bound by them. Respondents' history of previous violations is relevant to any penalty to be imposed under 7 U.S.C. § 2149(b). The sanction imposed against Respondents is appropriate under the circumstances and is in accordance with the Act and the Department's sanction policy.

In *In re Tammi Longhi*, AWA Docket No. 95-0074, decided by the Judicial Officer on July 11, 1997 (23 pages), the Judicial Officer affirmed the Ruling on Order to Show Cause by Administrative Law Judge James W. Hunt (ALJ) denying Respondent L & H Associates' application for a license. Complainant failed to prove by a preponderance of the evidence verbal abuse or harassment of APHIS officials in violation of 9 C.F.R. § 2.4. Granting a license to L &

H Associates, a partnership, would result in a person having two licenses, in violation of 9 C.F.R. § 2.1(c), because one of the partners in L & H Associates is an owner of and a principal in a corporation already holding a license. APHIS' interpretation of its regulations regarding persons eligible for a license must be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulations, provided that the interpretation does not violate the Constitution or a federal statute. Paragraph II(C) of the Order to Show Cause could have been more specific with respect to the matters of fact asserted. However, the formalities of court pleading are not applicable in administrative proceedings and due process is satisfied because Respondents were reasonably apprised of the issues in controversy and were not misled.

In *In re Julian J. Toney* (Decision and Order on Remand) AWA Docket Nos. 92-0014 and 94-0012, decided by the Judicial Officer on July 11, 1997 (11 pages), the Judicial Officer vacated the Order in *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995), and issued an Order permanently revoking Respondents' license, directing Respondents to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act, and assessing Respondents a civil penalty of $175,000. The United States Court of Appeals for the Eighth Circuit upheld the Judicial Officer's decision of *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995), in *Toney v. Glickman*, 101 F.3d 1236 (8th Cir. 1996), except for two violations and remanded the case to the Judicial Officer to recalculate the sanction without considering the two violations which the court found were unsubstantiated. The Administrator of the Animal and Plant Health Inspection Service recommended the reduction of the civil penalty assessed in *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995), from $200,000 to $175,000, and the Judicial Officer found that the reduction of the civil penalty is in accordance with the Act and the Department's sanction policy.

In *In re Dora Hampton*, AWA Docket No. 96-0050, decided by the Judicial Officer on July 22, 1997 (5 pages), the Judicial Officer modified the Order issued in *In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997). The Order in *In re Dora Hampton, supra*, is modified as set forth in a Proposed Order filed by Complainant and agreed to by Respondent.

In *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), P. & S. Docket No. 96-0059, decided by the Judicial Officer on August 1, 1997 (33 pages), the Judicial Officer affirmed the Default Decision as to Spring Valley Meats, Inc., issued by Administrative Law Judge Dorothea A. Baker (ALJ) assessing a civil penalty of $28,000 against Respondent Spring Valley Meats, Inc., and directing Respondent Spring Valley Meats, Inc., to cease and desist from violating the Packers and Stockyards Act, the regulations issued under the Act, and the Secretary's Order issued in P. & S. Docket No. D-91-75. Respondents' December 13, 1996, filing, which Respondents assert is their Answer, addresses matters extraneous to the Complaint and does not meet the description of an Answer in 7 C.F.R. § 1.136(b). Respondents' failure to respond to allegations of the Complaint is deemed, for the purposes of the proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)). Even if Respondents' December 13, 1996, filing were found to be an Answer denying the material allegations of the Complaint, it would not constitute a basis for setting aside the Default Decision as to Spring Valley Meats, Inc., because the December 13, 1996, filing was not filed within 20 days after

service of the Complaint on Respondents and is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision as to Spring Valley Meats, Inc., was properly issued. The record establishes that Respondents were provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondents due process.

In *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), P. & S. Docket No. 96-0059, decided by the Judicial Officer on August 1, 1997 (33 pages), the Judicial Officer affirmed the Default Decision as to Charles Contris issued by Administrative Law Judge Dorothea A. Baker (ALJ) assessing a civil penalty of $28,000 against Respondent Contris and directing Respondent Contris to cease and desist from violating the Packers and Stockyards Act, the regulations issued under the Act, and the Secretary's Order issued in P. & S. Docket No. D-91-75. Respondents' December 13, 1996, filing, which Respondents assert is their Answer, addresses matters extraneous to the Complaint and does not meet the description of an Answer in 7 C.F.R. § 1.136(b). Respondents' failure to respond to allegations of the Complaint is deemed, for the purposes of the proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)). Even if Respondents' December 13, 1996, filing were found to be an Answer denying the material allegations of the Complaint, it would not constitute a basis for setting aside the Default Decision as to Charles Contris because the December 13, 1996, filing was not filed within 20 days after service of the Complaint on Respondents and is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision as to Charles Contris was properly issued. The record establishes that Respondents were provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondents due process.

In *In re Dean Byard* (Decision as to Dean Byard), HPA Docket No. 94-0038, decided by the Judicial Officer on August 8, 1997 (30 pages), the Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of $2,000 against Respondent Byard and disqualifying Respondent Byard for 1 year because he entered a horse for showing or exhibiting while the horse was sore. Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. Application of the default provisions of the Rules of Practice does not deny Respondent due process. Respondent's decision to proceed *pro se* does not operate as an excuse for Respondent's failure to file an answer in this proceeding. The record reveals no basis for Respondent's impression that the case was settled. The Federal Rules of Civil Procedure do not apply to the Department's adjudicatory proceedings. There is no factual basis for estoppel. The Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that Complainant prove that a respondent's failure to file a timely answer has prejudiced Complainant's ability to present its case.

In *In re Auvil Fruit Company* (Decision as to Hoverhawk, Inc., and Lyons & Son, Inc.), 95 AMA Docket No. F&V 923-1, decided by the Judicial Officer on August 13, 1997 (57 pages), the Judicial Officer affirmed Administrative Law Judge Dorothea A. Baker's [hereinafter ALJ] dismissal of the 15(A) Petition and adopted the ALJ's Initial Decision and Order as the final Decision and Order. Initially, three Petitioners sought to modify the Cherry Order (Part 923--Sweet Cherries Grown in Designated Counties in Washington, 7 C.F.R. pt. 923), insofar as that Order regulates minimum size, sugar content (Brix), and maturity for Rainier cherries. The ALJ dismissed the petition as to Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., because they were not shown to be handlers. Petitioner Auvil's handler status was not challenged by Complainant, but the ALJ dismissed Auvil's Petition on the merits, as follows: (1) that the Rainier Cherry Order did not constitute an inverse condemnation of Petitioner Auvil's property contrary to the Fifth Amendment of the United States Constitution; (2) that the Secretary of Agriculture did not act in an arbitrary and capricious manner by adopting a final rule (59 Fed. Reg. 31,917) amending the Cherry Order; and (3) that the Secretary of Agriculture's actions did not violate Petitioner Auvil's substantive due process rights under the Fifth Amendment of the United States Constitution. Petitioner Auvil did not appeal to the Judicial Officer. Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., appealed the ALJ's decision that they were not handlers and argued the same merits on appeal as Petitioner Auvil had argued before the ALJ. The Judicial Officer agreed with the ALJ on all issues and affirmed the ALJ's Initial Decision and Order. The Judicial Officer agreed that Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., were not handlers, and that the dismissal of the Petition on the very same merits as to the handler Auvil would also apply to Hoverhawk, Inc., and Lyons & Son, Inc., should a reviewing court find them to be handlers. Respondent raised two issues on appeal with which the Judicial Officer agreed: that Petitioners' arguments to establish who is a handler based upon cases arising from marketing orders covering beef and apples are inapposite because those cases are based upon who collects and remits the assessments and not upon whether the handler ships product out of the production area as required by the Cherry Order; and the Secretary is not prohibited, under section 2 of the AMAA (7 U.S.C. § 602), from regulating Rainier cherries for the reason that the market price of Rainier cherries exceeded the parity price in the pertinent period because there is no separate parity price for Rainier cherries prepared by the Secretary apart from all sweet cherries, making such a price comparison impossible.

In *In re Donald B. Mills, Inc.*, MPRCIA Docket No. 95-0001, decided by the Judicial Officer on August 27, 1997 (56 pages), the Judicial Officer reversed Judge Bernstein's (ALJ) Initial Decision and Order granting a Petition, filed by a mushroom producer under the Mushroom Promotion, Research, and Consumer Information Act (7 U.S.C. §§ 6101-6112) (MPRCIA), seeking a declaration that the MPRCIA and the Mushroom Order (7 C.F.R. pt. 1209) violate Petitioner's First Amendment rights to freedom of association and speech and the MPRCIA violates Petitioner's Fifth Amendment right to equal protection of the laws. The burden of proof in a proceeding under 7 U.S.C. § 6106(a) rests with Petitioner, and Petitioner has not met its burden. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising does not implicate the First Amendment, is dispositive of the First Amendment issue in the proceeding. Petitioner is not prohibited or restrained by the

MPRCIA, the Mushroom Order, or the Mushroom Council from communicating any message to any audience; Petitioner is not compelled to speak either by the MPRCIA or by the Mushroom Order; the Mushroom Council's mushroom promotional efforts have no political or ideological content; and Petitioner is not compelled by the MPRCIA or the Mushroom Order to endorse or finance any political or ideological views. Thus, the requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not implicate Petitioner's rights to freedom of association and speech. Petitioner contends that the MPRCIA violates its right to equal protection of the laws under the Fifth Amendment because the MPRCIA exempts from assessments producers who produce: 1) 500,000 pounds of mushrooms or less per year; 2) process mushrooms; or 3) export mushrooms. Equal protection requires that persons similarly situated be treated alike. However, virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications. The general rule is that legislation is presumed to be valid and will be sustained if the statute's classification scheme is rationally related to a legitimate government interest, unless the statute creates a suspect clarification that impinges upon a constitutionally protected right. Since all three challenged classifications are rationally related to the legitimate government purposes of strengthening the mushroom industry's position in the marketplace, maintaining and expanding existing markets and uses for mushrooms, and developing new markets and uses for mushrooms, the MPRCIA complies with the equal protection component of the Fifth Amendment.

In *In re Lindsay Foods, Inc.*, FMIA Docket No. 96-0003, decided by the Judicial Officer on August 28, 1997 (15 pages), the Judicial Officer vacated Chief Administrative Law Judge Palmer's (Chief ALJ) Dismissal of Case for Lack of Jurisdiction and remanded the case for further procedure in accordance with the Rules of Practice. Respondents' Motion for Summary Judgment and Dismissal is a motion to dismiss on the pleadings which, in accordance with 7 C.F.R. § 1.143(b)(1), cannot be entertained. In addition, Respondents' Motion for Summary Judgment and Dismissal is a motion concerning the complaint which, in accordance with 7 C.F.R. § 1.143(b)(2), may not be made after the time allowed for filing an answer. Respondents' answer was due in mid-January 1996, and Respondents' Motion for Summary Judgment and Dismissal was filed on March 4, 1997.

In *In re Handlers Against Promoflor*, FCFGPIA Docket No. 96-0001, decided by the Judicial Officer on September 8, 1997 (16 pages), the Judicial Officer affirmed Chief Administrative Law Judge Palmer's Dismissal of Petition. Handlers Against Promoflor, an unincorporated association, is not a person subject to the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order and has no standing to file a petition under section 8(a) of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. § 6807(a)). The Second Amendment to Petition which deleted Handlers Against Promoflor as Petitioner and listed others as Petitioners did not cure the jurisdictional defect in the Petition because much of the Petition, even as amended by the First Amendment to Petition and Second Amendment to Petition, references Handlers Against Promoflor. Further, Petitioners' piecemeal amendments to the original Petition resulted in a confused and muddled record. A Third Amended Petition filed by Petitioners and others after the Chief ALJ dismissed the proceeding in its entirety was properly returned to second group of petitioners and the Chief

ALJ's act of returning the Third Amended Petition is not an *order* or a *decision* as those terms are defined in the Rules of Practice (7 C.F.R. § 1200.51(f), (*l*)). Therefore, no petition for reconsideration of the Chief ALJ's act of returning the Third Amended Petition may be filed under the Rules of Practice (7 C.F.R. § 900.68(a)(3)).